Blaze It or Ban It: The Battle Over Marijuana

BAILEY SANDERS*

TABLE OF CONTENTS

Upon first glance, Lee Blomquist's drug offense convictions and denial on appeal appears to be a run-of-the-mill consent exception to the Fourth Amendment's search warrant requirement.[1] A closer look, however, reveals three key issues: Did Blomquist consent to the search of his marijuana operation? Why did the federal government, and not the state government, charge him? Was the entire point of Michigan's social equity program frustrated by the federal government's actions? Blomquist's deceptively simple consent exception case demonstrates the tension between the federal government's resistance to legalizing medical marijuana and states' efforts, including social equity programs, to encourage medical marijuana businesses.

I. BACKGROUND

Lee Blomquist pled guilty and was convicted of the federal crimes of distributing and conspiring to distribute marijuana, as well as manufacturing and possessing with intent to distribute between 50–100 marijuana plants at trial in the U.S. District Court for the Western District of Michigan.[2] He then appealed his convictions to the Sixth Circuit, "arguing that the police exceeded the scope of their search warrant."[3]

Blomquist's legal troubles began with the KIND county drug enforcement team arriving at his father's property.[4] Upon arrival, the officers detained

---

* Bailey Sanders is a J.D. candidate at The Ohio State University Moritz College of Law and writes for THE OHIO STATE LAW JOURNAL *Sixth Circuit Review*.

[1] United States v. Blomquist, Nos. 19-2111/21121-2, 1–2 (6th Cir. Oct. 7, 2020) [https://perma.cc/KH3A-7YR5].

[2] *Id.* at 1.

[3] *Id.* at 2.

[4] *Felch Man Found Guilty of Manufacturing And Possessing With Intent To Distribute Marijuana,* THE UNITED STATES ATTORNEY'S OFFICE, WESTERN DISTRICT OF MICHIGAN,

Blomquist, handcuffed him, and read him his Miranda rights.[5] Blomquist waived his rights, was apparently cooperative enough that the police removed the handcuffs at some point, and gave the police an extensive tour of his marijuana production and processing operation.[6] He first showed the officers his binder containing paperwork that he believed demonstrated that he was running a legal operation.[7]

It is quite possible that Blomquist could have been operating a legal medical marijuana business. Michigan's Medical Marihuana Act acknowledges the beneficial uses of medical marijuana and allows for ways for residents to produce, distribute, and consume it.[8] From the Act, the Michigan Marijuana Regulatory Agency developed a new social equity program, the purpose of which was to "promote and encourage participation in the marijuana industry by people from communities that have been disproportionately impacted by marijuana prohibition and enforcement and to positively impact those communities."[9] This program helps participation in the medical marijuana industry through a variety of ways, including a twenty-five percent fee reduction for adult use licensing fees for residents in a disproportionately impacted community, and a twenty-five to forty percent fee reduction for individuals with marijuana convictions.[10]

Assuming that Blomquist was indeed conducting a legal medical marijuana business, could he truly give consent?[11] It is doubtful that he understood that the officers were conducting a Fourth Amendment search to gather evidence against him, and that was what he consented to. Because Blomquist believed his operation was legal, it seems rather unlikely that he consented.[12]

After first showing the officers his binder that contained paperwork he thought demonstrated that he was running a legal operation, Blomquist began to lead the officers around several properties.[13] Upon the officers' request, but of his own volition, he showed them the five small rooms in the chicken coop where he grew the marijuana.[14] Blomquist explained he usually moved the

---

https://www.justice.gov/usao-wdmi/pr/2019_0508_Blomquist [https://perma.cc/8LXN-AWLN] [hereinafter *Felch Man*].

[5] Blomquist, Nos. 19-2111/21121-2, at 2.

[6] *Id.*

[7] *Id.*

[8] Michigan Medical Marihuana Act (2008)

[9] Michigan Medical Marihuana Act, § 26422, (2008); *Social Equity*, MARIJUANA REGULATORY AGENCY, https://www.michigan.gov/mra/0,9306,7-386-93535---,00.html (last visited Oct. 28, 2020) [https://perma.cc/AQT6-QRK4].

[10] MRA Social Equity Program Infographic [https://perma.cc/YXL4-ABGP].

[11] The facts are unclear as to whether he had a license to operate in Michigan, whether he was a distributor or a primary caregiver, and whether his previous felony drug and firearm conviction qualified or disqualified him for either the distributor or caregiver operations. Blomquist, Nos. 19-2111/21121-2, at 2–3.

[12] *Id.* at 2.

[13] *Id.*

[14] *Id.*

marijuana to greenhouses in warmer weather and proceeded to show the officers those buildings.[15] The officers then asked where he stored the processed marijuana, so he led them to the garage on his father's property, brought down the attic ladder, and led them up to a locked room within the attic.[16] This room contained approximately thirty-seven pounds of pre-packaged marijuana.[17] Throughout the tour, there were apparently no physical indicators or explanations from Blomquist that the operation spanned several properties, and the record is unclear about when, or even if, the officers announced the existence of their search warrant. Additionally, it is uncertain where on the properties Blomquist was handcuffed or where they were removed.[18]

II. THE SIXTH CIRCUIT AND CONSENT – BLOMQUIST DID NOT CONSENT.

On appeal, Blomquist argued that the search was invalid because he did not give consent, the search exceeded the warrant, and that any consent he may have given was tainted as a result.[19] The court stated that valid consent is free and voluntary, and that the government must additionally show that the consent "was voluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion."[20] The Sixth Circuit also evaluated whether Blomquist gave consent by looking at the totality of the circumstances of the search.[21] Blomquist's consent was viewed as uncontaminated by looking at the totality of the circumstances, including factors such as "the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police."[22] There was no indication to the Sixth Circuit that Blomquist "was uniquely susceptible to duress or coercion."[23] He was forty-six years old at the time of arrest, had earned his high-school diploma, was trained as an electrician, and the district court described him as "a very intelligent individual."[24] Additionally, his extensive criminal history, including a 2002 arrest for growing more than one hundred marijuana plants on the same property, indicated to the court that he was well-versed with police and the legal system, and therefore was not under duress or coerced.[25]

---

[15] *Id.*
[16] *Id.*
[17] Blomquist, Nos. 19-2111/21121-2, at 2.
[18] *Id.* at 2, 6.
[19] *Id.* at 5–6.
[20] *Id.* at 4.
[21] *Id.*
[22] Blomquist, Nos. 19-2111/21121-2, at 4–5.
[23] *Id.* at 5.
[24] *Id.*
[25] *Id.*

Furthermore, the detention of Blomquist was brief, during which he heard and waived his Miranda rights, indicating that he was "fully aware that anything he shared with the officers could be used against him."[26] He then proceeded to share his entire growing operation with the officers.[27] While the officers did ask to see particular areas, they were not threatening, nor did they mistreat Blomquist in order to force him to take them to the requested sites.[28] The Sixth Circuit also considered Blomquist's full cooperation from the "get-go" as a factor that weighed on the side of uncontaminated consent.[29]

Blomquist attempted to counter the appellate court's finding that the consent exception applied by asserting that his consent was contaminated because of various issues relating to the search warrant.[30] First, because he was detained and there was the presence of a tactical law enforcement unit, his consent was therefore "tainted."[31] The Sixth Circuit reiterated that based on the totality of circumstances, these "factors do not appear to have influenced [Blomquist's] actions in any significant manner."[32] Second, he argued that the existence of the warrant coerced him into showing the officers his full operation and that because the scope of the warrant was violated, his consent was tainted.[33] The Sixth Circuit points out that the trial record does not show when, or even if, the officers ever announced the existence of the search warrant before Blomquist started his tour.[34] Blomquist even conceded in his appellate brief that he was "willing [to] and wanted to take [the police] to [the chicken coop]."[35] These facts together show that he was not coerced by the warrant. Furthermore, the Sixth Circuit highlighted that the record was unclear as to where Blomquist was detained, and even if he was detained on his cousin's property, "exceeding the scope of a search warrant does not automatically render consent non-voluntary."[36] *Id.*

Although the court claimed to look at the totality of the circumstances, it did not accord proper weight to the fact that Blomquist thought his operation was legal. It is arguable that from Blomquist's perspective, he was only giving a tour, and the cops were only asking questions. The consent tests require that consent be voluntary and intelligently given.[37] How can someone intelligently give consent to a search if they do not even know that it is a search? The police arrived in full tactical gear, but then they removed his handcuffs, accepted his

---

[26] *Id.*
[27] *Id.* at 1–2.
[28] Blomquist, Nos. 19-2111/21121-2, at 5–6.
[29] *Id.* at 5.
[30] *Id.* at 5–6.
[31] *Id.*
[32] *Id.*
[33] Blomquist, Nos. 19-2111/21121-2, at 6.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 4.

binder of paperwork, and simply asked to see the operation.[38] Furthermore, the record does not establish when, or even if, the officers showed Blomquist their search warrant, furthering the impression of a tour, not a search.[39] The court used his cooperation to establish voluntariness, and therefore consent, but it seems unlikely that Blomquist was consenting to a Fourth Amendment search as he believed there was nothing illegal to search.[40]

III. ASSUMING CONSENT—THE FEDERAL GOVERNMENT SHOULD NOT HAVE HANDLED BLOMQUIST'S CASE

Let us assume, for argument's sake, that there was consent. This case presents an even more interesting issue: which state medical marijuana law did Blomquist actually violate? His conviction rested solely on federal crimes, but on appeal, the Sixth Circuit stated that Blomquist had also broken state laws.[41] However, if he did break state law, he should have been indicted by the state of Michigan, not the federal government.

The Sixth Circuit stated that Blomquist's operation was not even legal under Michigan law because he had a federal felony drug record and cited to Mich. Comp. Laws § 333.26423(k) (2016) for support.[42] The subsection the court cited to is the definition section of Michigan's Medical Marihuana Act, which states that a "'primary caregiver' or 'caregiver' means a person . . . who has agreed to assist with a patient's medical use of marihuana and who has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs . . . ."[43] However, the court does not establish that Blomquist was considered a "caregiver"; in fact, in the very next sentence, it classifies Blomquist as a distributor.[44] So which category does Blomquist fall into? The distinction is critical, as distributors are subject to very different stipulations than caregivers, regarding both previous convictions and quantities of marijuana.[45] Unfortunately, the Sixth Circuit did not make this distinction clear.

Blomquist, if a distributor, was not prohibited by a prior felony drug conviction from running a medical marijuana operation.[46] That conviction instead qualified him to participate in Michigan's social equity program, since

---

[38] *Id.* at 2, 5–6.

[39] Blomquist, Nos. 19-2111/21121-2, at 6.

[40] *Id.* at 5.

[41] *Id.* at 2–3.

[42] *Id.*

[43] Michigan Medical Marihuana Act, § 26423(k) (2008) [https://perma.cc/JN83-XKT8].

[44] Blomquist, Nos. 19-2111/21121-2, at 3.

[45] Michigan Medical Marihuana Act, § 26423(k), 26424.

[46] *Laws, Rules, Bulletins, Grants & Other Resources*, MARIJUANA REGULATORY AGENCY, https://www.michigan.gov/mra/0,9306,7-386-82631---,00.html (last visited Oct. 28, 2020) [https://perma.cc/5NC6-CS6X].

it was marijuana related.[47] However, if Blomquist was a caregiver, any type of felony would preclude him from qualifying as a legal caregiver.[48]

The court also stated that his operation was too large to be legal as a distributor and that Blomquist sold marijuana to a person without a medical marijuana card.[49] However, the court did not cite to any Michigan law or Marijuana Regulatory Agency regulation to support the claim that Blomquist's operation was too large. Nor did the court focus in on the fact that the person Blomquist sold marijuana to was also from Wisconsin—which is how the federal government could charge Blomquist for these federal crimes.[50]

In *Gonzales v. Raich*, the Supreme Court held that regardless of state laws allowing the use of marijuana for medical purposes, Congress still retained authority under the Commerce Clause of the United States Constitution to "prohibit local cultivation and use of marijuana in compliance with California law."[51] Even though Blomquist was allegedly running a Michigan medical marijuana operation and violating state law, because he sold his marijuana to a man from Wisconsin, the Commerce clause was triggered, and the federal government had jurisdiction to prosecute him. Despite this, it does not seem prudent for this case to be handled by the federal government.

Regardless of how Blomquist violated the social equity program, his indiscretions were not addressed at the state level. As the Michigan Marihuana Act states, "approximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law," which indicates a good reason for dealing with cases like Blomquist's at the state level.[52] Blomquist's case does not seem so egregious that it should be the one out of one hundred cases handled by the federal government. In fact, it is similar to a case that the State of Michigan handled.

In *People v. Hartwick*, the defendant, Richard Lee Hartwick, was charged with possession of marijuana with intent to deliver and manufacturing twenty to two hundred marijuana plants.[53] County police officers received a tip concerning a marijuana growing operation in Hartwick's house.[54] When they

---

[47] *Id.* Indeed, the U.S. Attorney's Office for the Western District of Michigan released a memo stating that Blomquist was convicted in 2003 for manufacturing marijuana. The memo also indicates that Blomquist had a felon in possession of a firearm conviction but does not specify whether that was a result of the drug conviction or if it happened previously. *Felch Man.*

[48] Michigan Medical Marihuana Act, § 26423(k).

[49] Blomquist, Nos. 19-2111/21121-2, at 2–3.

[50] *Felch Man.*

[51] Gonzales v. Raich, 545 U.S. ___ at 1 (2005) [https://perma.cc/936R-8HQS]. The Commerce Clause is the colloquial name for the part of Section 8 that states Congress can "regulate Commerce with foreign Nations, and among the several States. *Id.*

[52] Michigan Medical Marihuana Act, § 26422.

[53] People v. Hartwick, Nos. 148444/148971, at 8 (Mich. July 27, 2015) [https://perma.cc/ZNB3-SBTQ]. Hartwick's case was combined with the case of People v. Tuttle, No. 148971.

[54] *Id.* at 7.

arrived and confronted Hartwick, he claimed he was in compliance with Michigan's Medical Marijuana Act, and he consented to a search of his house.[55] Hartwick showed the officers his operation: between seventy-one and seventy-seven marijuana plants at various stages of growth, as well as consumable marijuana.[56]

Hartwick was charged by the county prosecutor and contested it, claiming the immunity and affirmative defenses under the Medical Marihuana Act.[57] The immunity defense derives from Section 4 of the Act, which provides that qualifying patients and primary caregivers are each not subject to arrest or prosecution if compliant with limitations on quantities of marijuana and registry identification cards.[58] The affirmative defense derives from Section 8 of the Act, which provides that a patient and the patient's primary caregiver can assert the defense of marijuana use for medical purposes. The defense is allowed if they have a bona fide relationship with a physician that determined marijuana is likely to help their condition and the quantity of marijuana possessed is reasonable in relation to their condition.[59]

Hartwick's case, which was similar to Blomquist's situation, was aptly handled by the State of Michigan's court system. The trial court analyzed Hartwick's Section 4 and Section 8 claims, based on the evidence he produced and the language of the statute, and concluded that he was not entitled to either defense.[60] Hartwick appealed to the Michigan Court of Appeals, which affirmed the lower court's decision.[61] Upon reaching the Supreme Court of Michigan, Hartwick's case was used as an opportunity for the court to analyze Section 4 and 8 and provide clear interpretations for future use.[62] The court outlined eleven guidelines for applying Section 4 and three for Section 8.[63] Hartwick's claim under Section 4 was remanded to the lower court, and he lost under Section 8.[64] The State of Michigan is clearly able to handle cases such as Blomquist's, as demonstrated by Hartwick appealing his case up to the Supreme Court, and the courts' detailed analysis of the Medical Marijuana Act.

IV. THE FEDERAL GOVERNMENT IS FRUSTRATING MICHIGAN'S SOCIAL EQUITY PROGRAM

It simply does not make sense why the federal government would go after Blomquist, an individual selling marijuana to a single out-of-state individual.

---

[55] *Id.*
[56] *Id.* at 8.
[57] *Id.*
[58] Michigan Medical Marihuana Act, § 26424.
[59] Michigan Medical Marihuana Act, § 26428.
[60] Hartwick, Nos. 148444/148971, at 9.
[61] *Id.*
[62] *Id.* at 5–6.
[63] *Id.*
[64] *Id.* at 7.

Michigan's social equity program's very purpose is to incentivize affected individuals to lawfully participate in the medical marijuana field. The federal government's actions in this case seem to frustrate the very purpose of that program by punishing Blomquist instead of allowing the state to handle his infraction. Beyond the Medical Marijuana Act providing defenses against prosecution for medical marijuana, the Michigan Marijuana Regulatory Agency provides detailed consequences for violations of the program.[65] Rules 420.801–808 provide definitions, requirements for notifications and reporting, changes to licensed marijuana business', notifications of diversion, theft, loss, or criminal activity, persons subject to penalties, violations, what the penalties are, agency warnings, and formal complaints.[66] Within these very specific sections, the regulations provide the agency with a variety of responses to violations, including warnings, citations, formal complaints, and penalties.[67] Adding another felonious marijuana conviction to Blomquist's record simply adds to the problem that Michigan is trying to address, especially when Blomquist could have been adequately punished under state law had he been found to have committed any infractions.

The tension-filled relationship between federal and state authorities with regard to the legalization of medical marijuana, as demonstrated by Mr. Blomquist's situation, does not appear to be improving any time soon. *Gonzales* was decided in 2005, and since then, at least 20 states have legalized medical marijuana.[68] Blomquist's case was decided in 2020.[69] It is disappointing, although not inconsistent, that federal authorities are still interfering with state social equity programs. What appeared to be a cut and dry consent exception to the Fourth Amendment search warrant requirement in a little over six-page opinion of the Sixth Circuit led to several important issues: it does not appear that Blomquist truly consented to a search, as he likely did not know it was a search, the federal government should not have handled his case, and by doing so, the government frustrated the very point of Michigan's social equity program.

---

[65] MARIHUANA DISCIPLINARY PROCEEDINGS, Michigan Administrative Code, R 420.801–808 (2020).

[66] *Id.*

[67] *Id.*

[68] Raich, 545 U.S. ___; *Historical Timeline*, PROCON.ORG, https://medicalmarijuana.procon.org/historical-timeline/#2005-2009 (last visited Oct. 28, 2020) [https://perma.cc/26W9-8ABS].

[69] Blomquist, Nos. 19-2111/21121-2, at 1.